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June 26, 2015

Director Vikki Wachino
Center for Medicaid and CHIP Services
Centers for Medicare & Medicaid Services
7500 Security Boulevard Baltimore, MD 21244

Email: Victoria.Wachino1@cms.hhs.gov

Re: Comments on Florida's April 20, 2015, Low Income Pool Amendment Request

Dear Ms. Wachino:

On behalf of Florida Legal Services, Inc., (FLS) we are submitting these comments on Florida's Low Income Pool Amendment Request (Amendment Request) posted for public comment on April 20, 2015.

FLS is a statewide not for profit law firm representing low income individuals and families on a range of poverty law issues, including access to health care. We very much appreciate the hard work of the Centers for Medicare and Medicaid Services (CMS) however, we would like to express our disappointment that an agreement between the Centers for Medicare and Medicaid Services (CMS) and the Agency for Health Care Administration (AHCA or the Agency) was made public on June 23, 2015, prior to the end of the public comment period.

Attached, you will find our initial comments submitted to Florida's Agency for Health Care Administration (AHCA) on May 22, 2015. We would like to reiterate our previous comments, underscoring these points:

(1) The LIP Program has never had any meaningful monitoring and the State's amendment request does not appear to address this longstanding deficiency.[1] While the Amendment

[1] Navigant Healthcare, *Study of Hospital Funding and Payment Methodologies for Fla.,* 24-25, 142, 181 (Feb. 27, 2015) (finding "audits are not performed for the LIP program," "few if any standard reports," "very little review," and insufficient monitoring manpower) ("Navigant Report").

promises to "focus on maintaining access and quality of care to vulnerable populations" (Amendment at 2) and requires documentation to the Agency of "improved quality measures and identified patient outcomes" (Amendment at 9) the words on the paper are meaningless without monitoring and reporting requirements and dedicated funding.

(2) Throughout the *Scott v. Burwell* litigation, AHCA repeatedly represented that the State had assured CMS that no future LIP funds would go to reimburse providers for the cost of treating people who would have been eligible for Medicaid expansion. It is unclear from the amendment where this so called "assurance" is included. But, in an abundance of caution, if this "assurance" is somewhere in the amendment, we would urge that it be rejected. While it is certainly unfortunate that Florida continues to reject federal funding for coverage of Medicaid eligible Floridians, not allowing reimbursement for the care of these individuals by LIP providers would only further hurt low-income uninsured Floridians.

Thank you for your consideration.

Sincerely,

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May 22, 2015

1115 MMA Amendment Request
Office of the Deputy Secretary for Medicaid
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Re: Comments on Florida's April 20, 2015, Low Income Pool Amendment Request

Dear Mr. Senior:

On behalf of Florida Legal Services, Inc., (FLS) we are submitting these comments on Florida's Low Income Pool Amendment Request (Amendment Request) posted for public comment on April 20, 2015.

FLS is a statewide not for profit law firm representing low-income individuals and families on a range of poverty law issues, including access to health care. We very much appreciate the hard work of the Agency in providing an opportunity for public comment and in person meetings throughout the state. In that regard, we are hopeful that as the state (and CMS) moves forward, there will be full transparency at every stage of the negotiation to allow for public review and comment. However, we would like to express our disappointment that a preliminary agreement between the Centers for Medicare and Medicaid Services (CMS) and the Agency for Health Care Administration (AHCA or the Agency) was made public on May 21, 2015, prior to the end of the public comment period.

As an initial matter, it is important to note that the Amendment Request is identical to the Low Income Pool (LIP) plan proposed by the Florida Senate.[1] The Senate's LIP plan, however, unlike the Amendment Request, is part and parcel of a proposal that includes federal funding to

[1] Press Release, President's Office, Memo: Senate Plan for Medicaid Sustainability (March 19, 2015), *available at* https://www.flsenate.gov/Media/PressRelease/Show/2204.

extend coverage to uninsured low-income Floridians through the Florida Health Insurance Affordability Exchange (FHIX) plan. Senate President Gardiner reiterated this inexorable connection in his April 17, 2015 statement to the Senate, "As you are aware, the Senate proposed and passed a new LIP model ***based on the coverage expansion outlined in the FHIX program***"[2] (emphasis added).

We understand that the Agency lacks authority to include coverage expansion within the waiver amendment process. However, because the Senate's LIP proposal cannot be delinked from FHIX, we want to underscore that the concerns expressed in this comment letter relate strictly to the Amendment Request—and *not* to the Senate's LIP plan.

As consumer advocates, we understand and appreciate the role that LIP has played in sustaining a safety-net for uninsured low-income Floridians. However, LIP–either in its current form or as in the Amendment Request–does not address the problems of the uninsured in Florida in a rational way. A much more reasonable, rational approach is articulated in the principles outlined in CMS's letter of April 14, 2015.[3]

The July 31, 2014, letter sent by CMS to Florida's Deputy Secretary for Medicaid, confirming that LIP would end June 30, 2015, also required the state to commission an independent report that would "review the adequacy of payment levels, and the adequacy, equity, accountability and sustainability of the state's funding mechanisms for these payments."[4] The resulting Navigant Report (the Report) is now being relied on by the State as a reason for continuing LIP and for critiquing the CMS principles in the April 14, 2015, letter.[5]

In fact, the Report's conclusions support CMS' principles (as do we), particularly the first principle that "coverage rather than uncompensated care pools is the best way to secure affordable access to health care for low-income individuals." The Report's authors do note that "…Medicaid expansion would [not] do away with uncompensated care entirely."[6] Thus the

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[2] THE FLORIDA SENATE, WORKSHOP ON THE SENATE PLAN FOR MEDICAID SUSTAINABILITY, at 2 (Apr. 21, 2015), *available at* http://www.faast.org/sites/default/files/Supporting%20042415.pdf.

[3] Letter from Vikki Wachino, Acting Director, Centers for Medicare and Medicaid Servs., to Justin Senior, Deputy Secretary for Medicaid, Fl. Agency for Health Care Administration (Apr.14, 2015) [hereinafter *Vikki Wachino letter*], *available at* http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2015/04/15/Editorial-Opinion/Graphics/florida_medicaid_letter.pdf. ("First, coverage rather than uncompensated care pools is the best way to secure affordable access to health care for low-income individuals. Second, Medicaid payments should support services provided to Medicaid beneficiaries and low-income uninsured individuals. Finally, provider payment rates must be sufficient to promote provider participation and access, and should support plans in managing and coordinating care.").

[4] Letter from Cindy Mann, Director, Centers for Medicare and Medicaid Servs., to Justin Senior, Deputy Secretary for Medicaid, Fl. Agency for Health Care Administration, at 1 (July 31, 2014), *available at* http://ahca.myflorida.com/Medicaid/statewide_mc/pdf/mma/July312014ApprovalLetter.pdf.

[5] *Vikki Wachino letter*, *supra* note 3.

[6] *See, e.g.,* NAVIGANT HEALTHCARE, STUDY OF HOSPITAL FUNDING AND PAYMENT METHODOLOGIES FOR FLORIDA MEDICAID, PREPARED FOR: FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, at 185 (Feb. 27, 2015) ("The LIP program has been used to incentivize IGTs")[hereinafter *Navigant Report*], *available at* http://ahca.myflorida.com/medicaid/Finance/finance/LIP-DSH/LIP/docs/FL_Medicaid_Funding_and_Payment_Study_2015-02-27.pdf.

authors "hope the **DSH** program could continue even if Florida decided to undergo expansion"[7] (emphasis added). DSH refers to the Disproportionate Share Hospital Program, which is scheduled to be reduced under the Affordable Care Act.[8] By contrast, for LIP, the authors noted that "the **LIP** program on the other hand, could justifiably be reduced if the number of uninsured reduced significantly through expansion."[9] The Report underscored that there *are problems* with limited compensation for uninsured and underinsured, and the best way to mitigate these problems is with some form of Medicaid expansion.[10] In sum, the Navigant authors concluded that "expansion would significantly mitigate the problems associated with limited compensation for uninsured or underinsured."[11]

Indeed, if Florida were to adopt the Senate's plan this would allow enrollment of an estimated 770,000[12] individuals by July 1, 2015, and the opportunity to pay for their coverage at 100% Federal Medical Assistance Percentages (FMAP). This offers the state a critically important and potentially fleeting window of opportunity to mitigate the serious issues confronting our underfunded Medicaid system.[13] Significantly, CMS's letter of May 21, 2015 to the Deputy Secretary for Medicaid raise the question over whether or not "Florida reimbursement rates comply with the requirements of section 1903(a)(30)(A) of the Social Security Act."[14]

Moreover, there is simply not enough funding in the LIP program to reimburse Florida safety-net providers for their potential costs, even if they treated all of the uninsured who would be eligible for Medicaid expansion—not to mention boosting the Medicaid rates for these providers. For example, even in Miami-Dade County, whose public hospital gets far more LIP than any other hospital in the state, the funding is grossly insufficient to provide reimbursement for treating the County's low-income uninsured residents. Jackson Health System has a charity care program available to all county residents regardless of national origin.[15] This program costs the hospital

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[7] *Navigant Report*, *supra* note 6, at 185.

[8] Robin Rudowitz, THE HENRY J. KAISER FAMILY FOUNDATION, HOW DO MEDICAID DISPROPORTIONATE SHARE HOSPITAL (DSH) PAYMENTS CHANGE UNDER THE ACA? (Nov. 2013) [hereinafter Kaiser DSH Issue Brief], available at http://kff.org/medicaid/issue-brief/how-do-medicaiddisproportionate-share-hospital-dsh-payments-change-under-the-aca/

[9] *Id.*

[10] *Navigant Report*, *supra* note 6, at 203.

[11] *Id.*

[12] THE FLORIDA LEGISLATURE OFFICE OF ECONOMIC AND DEMOGRAPHIC RESEARCH, IMPACT ANALYSIS, LIP, IGTS, AND SB 2512, at 7 (Apr. 21, 2015), *available at http://edr.state.fl.us/Content/presentations/affordable-care-act/Expansion2015PresentationtoSenate.pdf*.

[13] *Vikki Wachino letter*, *supra* note 3, at 3; *Florida Pediatric Society/The Florida Chapter of the American Academy of Pediatrics v. Dudek*, No. 05-23037-CIV, (S.D. Fla. 2014). The Report also notes that the state of Florida has not yet implemented the sort of rate sustaining measures that have been adopted by other states, e.g. California, to support safety net providers in a managed care environment.

[14] *Vikki Wachino letter*, *supra* note 4, at 3.

[15] Jackson Health System, *Financial Assistance for Medical Care, available at* http://www.jacksonhealth.org/library/financials/financial-assistance-for-medical-care.pdf

$365 million.[16] Hospital officials report that 29,176 county residents are served.[17] That number includes 6,000 who would be ineligible for Medicaid expansion due to immigration status.[18] Thus, netting out the ineligible immigrants, the number served is only about 23,000. This represents less than the 20% of the County's residents in the coverage gap and approximately 12% of those who would be eligible for coverage if the state accepted federal expansion funding.[19]

Further, the lack of current funding (without Medicaid expansion) also contributes to barriers even for those who manage to get into the charity care program. Co-payments for services other than primary care and prescription drugs are fundamentally unaffordable. For example, the co-payments for a specialist visit for a person under 100% FPL is $40. Outpatient procedures, including dental, are $100. It is well established that these co-payments, which far exceed those allowed in the Medicaid program, create serious if not insurmountable barriers to care for indigent individuals. In addition, indigent residents in the charity care program are routinely subject to out of network billing by physicians who are not part of the Jackson charity care program, e.g. anesthesiologists.[20] When advocates and consumers have complained about these barriers, Jackson officials respond that there are inadequate funds to provide uncompensated care.[21]

Should CMS consider granting some or all of the LIP in the Amendment Request, it is critical that any new waiver terms include requirements that the safety-net providers receiving LIP funding (including hospitals and FQHCs) agree not charge co-payments that exceed those

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[16] Daniel Chang, *Advocates for poor say Jackson Health System bars needy from charity care*, MIAMI HERALD, (Aug. 28, 2014), *available at* http://www.miamiherald.com/news/local/community/miami-dade/article1983097.html.

[17] *Id.*

[18] E-mail from Ashwin Kumar, Jackson Healthy System (Apr. 8, 2015, 08:54 AM EST) (on file with author).

[19] According to AHCA, Medicaid recipients in Miami-Dade account for 18.26% of Medicaid recipients in the state of Florida. *(*FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, CURRENT COMPREHENSIVE MEDICAID MANAGED CARE ENROLLMENT REPORTS: SEPTEMBER 2014, at table 5, *available at* http://ahca.myflorida.com/mchq/managed_health_care/MHMO/docs/MC_ENROLL/RF_NR_SMMC/ENR_Sep2014.xls). Assuming that the percent of people in the coverage gap, per county, is roughly equivalent to the percent currently on Medicaid, per county, the number of people in the coverage gap in Miami-Dade County is derived by multiplying the number in the gap statewide, 669,000, (THE HENRY J. KAISER FAMILY FOUNDATION, THE COVERAGE GAP: UNINSURED POOR ADULTS IN STATED THAT DO NOT EXPAND MEDICAID – AN UPDATE (Apr. 17, 2015), *available at* http://kff.org/health-reform/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid-an-update/) by 18.26%, totaling approximately 122,000.

According to the Robert Wood Johnson Foundation and the Urban Institute, there are approximately 1,060,000 Floridians eligible for Medicaid expansion. (Stan Dorn, et. al., Robert Wood Johnson Foundation & Urban Institute, WHAT IS THE RESULT OF STATES NOT EXPANDING MEDICAID, at 5 (Aug. 2014), *available at* http://www.urban.org/UploadedPDF/413192-What-is-the-Result-of-States-Not-Expanding-Medicaid.pdf). As stated above, Medicaid recipients in Miami-Dade account for 18.26% of Medicaid recipients in the state of Florida. Assuming that the percent of people eligible for Medicaid expansion, per county, is roughly equivalent to the percent currently on Medicaid, per county, the number of people eligible in Miami-Dade County is derived by multiplying the number eligible statewide, 1,060,000, by 18.26%, totaling approximately 190,000.

[20] *See supra* note 16.

[21] *Id.*

allowed under Medicaid; that hospital LIP recipients comply with the new IRS rules under the ACA;[22] that hospitals establish eligibility for their charity care programs that use the same income methodology as MAGI; that verification of income requirements also be similar and no more onerous than applying for insurance under healthcare.gov; and, that all services provided under the charity care program be included, i.e. no out of network billing allowed.

Additionally, the amendment request, while claiming to address the lack of transparency and accountability, does not provide any plan for how the newly promised "transparency and accountability" would occur. Any potential new program should include very specific monitoring provisions, including for the Tier-one Milestone distributions. Again, the Navigant Report noted the serious lack of funding for monitoring.[23] And for these new monitoring provisions to be meaningful, they must also include funding for monitoring activities by independent entities not associated with the LIP recipient. Ideally, monitoring should include a role for entities that have an institutional connection to low income uninsured individuals, e.g. local legal aid programs. Legal services programs (or other consumer advocates) could fill the current monitoring void and help actually "ensure" some local accountability for what the Amendment Request promises: "*the newly redesigned LIP* ***ensures access*** *to care for low income populations that are not eligible to participate in Medicaid*."[24]

Thank you for your consideration.

Sincerely,

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[22] 26 U.S.C. § 501(r)(3)-(6).

[23] *Navigant Report*, *supra* note 6, at 142.

[24] FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, *Low Income Pool Amendment Request,* at 1 (Apr. 20, 2015), *available at* http://ahca.myflorida.com/medicaid/statewide_mc/pdf/mma/Public_Notice_Document_LIP_Amendment_Req.pdf.